United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-1251

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1251

UNITED STATES OF AMERICA,

Appellant,

-against-

JOHN MAURO and JOHN FUSCO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR REHEARING EN BANC

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PRELIMINARY STATEMENT

The United States by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing, or in the alternative, rehearing en banc, of the judgment of this court entered on October 26, 1976, which affirmed orders of the District Court dismissing indictments on the ground that the Interstate Agreement on Detainers, 18 U.S.C. App., ("Agreement") had not been complied with.

STATEMENT

On November 3, 1975, by separate indictments, John Mauro and John Fusco were charged with criminal contempt of court (18 USC §401), for their refusal to testify before a Grand Jury. Separate writs of habeas corpus ad prosequendum were issued on November 5, 1975, by the District Court directing that Mauro and Fusco, both of whom were incarcerated on sentences imposed by New York State, be produced in the federal court. Pursuant to these writs, they were arraigned on the respective indictments on November 24, 1975. Thereafter, on December 2, 1975, the parties appeared in court to set trial dates. After setting dates of February 4, 1976 (Fusco) and March 17, 1976 (Mauro), Judge Bartels remarked that the Metropolitan Correctional Center was "overcrowded"

and ordered the defendants returned to state custody and to be "writ down" for trial. Shortly, thereafter, both were returned to state custody.

Writs of habeas corpus ad prosequendum were again issued on March 2, 1976 (Fusco) and April 14, 1976 (Mauro), under which each defendant was produced in the Eastern District on April 14 and April 29, 1976, respectively. However, prior to these appearances they had moved for dismissal of their indictments on the ground that they had been returned to state custody without having been tried on the federal indictments, in violation of Article IV(e) of the Agreement. The District Court agreed and ordered the dismissal of the indictments.

On appeal the Government argued that a writ of habeas corpus ad prosequendum, issued under 28 U.S.C. §2241-(c)(5), is enforcible court process and not the same as a detainer under the Agreement. It was argued that the Agreement did not, in effect, repeal this writ. Therefore, so the Government contended, the Agreement was not the sole means whereby the federal courts may obtain sentenced state prisoners for trial and its provisions are inapplicable when a writ is employed. In addition, it was urged that the Agreement, according to its legislative history, applied to the United States only as a sending State, not as a receiving State.

THE OPINIONS OF THE PANEL

The majority opinion by Judge Mulligan dealt with these two issues separately. In Part II, the majority rejected the Government's argument "that the habeas writ is mandatory and compels the production of the State prisoner" and held that the "writ of habeas corpus ad prosequendum is a detainer" (Slip. op. 271). The majority relied on United States v. Oliver, 523 F2d 253,258 (2d Cir. 1975) and Carbo v. United States, 364 U.S. 611 (1961) as authority for its statement that the writ was addressed to the cooperation of New York, the asylum state. Moreover, it was held that the Agreement is the sole means of exchanging prisoners between the party states to be Agreement. (Slip op. 272). Judge Mulligan, in Part III of his Opinion, relying on the language of the Agreement and its legislative history, held that the "United States is both a sending and receiving State" (Slip. op. 274) and that the writ remains only where a "defendant [is] imprisoned in a non-participating jurisdiction." (Slip. op. 275-276)

Judge Mansfield dissented on the grounds that a writ of habeas corpus ad prosequendum is "not a 'detainer' but a valid order pursuant to 28 USC §2241(c)(5)." (Slip.op. 278). The dissenting opinion pointed out that "Unlike a detainer, a federal writ of habeas corpus ad prosequendum is

a federal court order commanding the immediate production of a prisoner at a federal trial" (Slip. op. 279) and that, contrary to the majority's view, "the writ would be . . . enforceable against [a state] institution under the Supremacy Clause." (Slip op. 280).

Additionally, Judge Mansfield determined that the "writ is wholly unrelated to detainers" (Slip op. 282) and that "nothing in the language or legislative history of the Detainers Act [the Agreement] indicated any intent on the part of Congress to repeal or modify §2241 or to supplant federal writs of habeas corpus, which serve one distinctive purpose, with detainers, which serve another" (Slip op. 283).

REASONS FOR GRANTING THE PETITION

A. Introduction.

This case raises issues of critical importance to the orderly administration of the federal system of criminal justice. By holding that a writ of habeas corpus ad prosequendum is a detainer contemplated by the Agreement, with its prejudicial consequences, the court has implicitly partially repealed §2241(c)(5) and required the unwarranted dismissal of valid federal indictments in cases where federal prosecutors and district courts quite properly relied on an extant valid statute. Moreover, in holding that the writ, a federal

court order issued pursuant to §2241(c)(5), is merely an administrative detainer, with no further force and effect and lacking enforcibility, this Court has impugned federal supremacy in a manner unsupported by precedential authority.

It is contended that en banc consideration is appropriate because of the supremacy issue alone. This question, which had been expressly reserved in Carbo v. United States, supra at 621, n.20, was decided by the majority relying on dictum in United States v. Oliver, supra at 258 (Slip op. 271). It is our contention that the Oliver dictum is incorrect and that, as Judge Mansfield pointed out in his dissent, the writ is "enforcible" federal court process (Slip op. 280).

Additionally, en banc consideration is appropriate to review the holding that §2241(c)(5) has been impliedly repealed, or has classified the writ as a detainer for purpose of the Agreement a holding not supported by the legislative history of the Agreement. This decision is unwarranted and contravenes the rule of Rosencrans v. United States, 165 U.S. 247, 262 (1896).

B. Writ of Habeas Corpus ad Prosequendum is Not a Detainer

Simply put the Government contends that the ad prosequendum writ, as Judge Mansfield stated in his dissent, is "not a 'detainer' but a valid federal order pursuant to

28 U.S.C. §2241(c)(5)." He stated that there are:

> "significant functional and legal differences between a detainer and a federal writ of habeas corpus. A detainer, as its name implies, is an administrative notification lodged with a prison authority, advising that a certain prisoner in its custody is wanted for prosecution elsewhere and requesting that the prisoner be detained or held to face the out-of-state charge. See S. Rep. No. 1356, 91st Cong., 2d Sess., 1970 U.S. Code and Admin. News, 4864-65. The detainer is not an order commanding or obligating the custodian to produce the prisoner; it is merely a request, usually respected as a matter of comity between states, to detain the prisoner so that a representative of the requesting state may take custody, with the consent and cooperation of the holding state, and transport or release him to the requesting state for the purpose of facing the new charge."

This definition of a detainer is supported not only by the Senate Report cited, but also in the House debate on the Agreement. 8 Cong. Rec. H. 3814 (May 4, 1970) (remarks of Congressman Kastenmeir); 20 Cong. Rec.; See also, 9 Cong. Rec. H. 3354 (May 6, 1968) (remarks of Congressman Kastenmeir). A detainer has similarly been defined by the commentators. E.g., Note, The Detainer: A Problem in Interstate Criminal Administration, 48 Colum. L. Rev. 1190 (1948).

At this point, is important to note that although the Agreement does not specify exactly what a detainer is, the legislative history, makes it clear that it is as set forth above. Certainly, however, nowhere in the Congressional

debates, the Senate Report, or the Agreement itself, is there any reference to the writ of habeas corpus ad prosequendum. This is obviously because such a writ was not considered to be a detainer which is "lodged" with the appropriate authorities (e.g. Article III, Agreement; Article IV, Agreement). Rather, a writ is, by its terms, immediately executed.

Judge Mansfield, in his dissenting opinion, clearly spelled out the distinction:

> "Unlike a detainer, a federal writ of habeas corpus ad prosequendum is a federal court order commanding the immediate production of a prisoner at a federal trial. Congress has expressly authorized the federal district courts, without qualification, to issue such writs for the production of a prisoner where "it is necessary to bring him into court to testify or for trial." 28 U.S.C. §2241(c)(5). Upon being served with a writ of habeas corpus ad prosequendum, the state authority does not treat the writ as a detainer; it turns the prisoner over at once to the federal custodian, usually a U.S. Marshal. Nor is the prisoner thus surrendered by the state pursuant to any enabling law passed by it, such as the Detainers Act, but pursuant to §2241, which represents the supreme law of the land, Const. Art. VI, cl. 2, and extends beyond the geographical boundaries of the district court which issued the writ. Carbo v. United States, 264 U.S. 611 (1961).

Finally, the disadvantages that Congress found a prisoner under a detainer suffers, do not exist with a detainer.

As conceded at oral argument by appellants, the writ, which is immediately executed and satisfied upon return of the state prisoner, does not have the disadvantages of the detainer with respect to rehabilitation, parole, and other prisoner programs. See, also, Judge Mansfield's dissenting opinion (Slip. op. 281-282).

C. Writ of Habeas Corpus is a Federal Order enforcible under the Supremacy Clause.

It is the Government's contention that the writ of habeas corpus ad prosequendum issued under §2241(c)(5) is an order of the district court enforcible against state authorities by authority of the Supremacy Clause. U.S. Court Art. VI, cl.2. Again Judge Mansfield, correctly we submit, has succinctly recognized the applicability of federal supremacy. First, he explained why there have been no reported cases expressly holding that the result of a federal-state collision would be the enforcibility of the writ:

> "Because state authorities have apparently always complied with the commands of such federal writs, the federal government has never, according to our research, been called upon to invoke federal supremacy." (Slip op. 279) 1/

1/ Our research, too, has failed to produce such a case. A possible collision had been averted in Kyle v. United States, 211 F2d 912 (9th Cir. 1954), where the state official stated a state prisoner's custody would not be disturbed and the federal authorities apparently did not pursue the issue and never obtained a federal writ.

Judge Mansfield continued:

> "[I]n Carbo v. United States, 364 U.S. 611 (1961), the Supreme Court, in holding that federal district courts have the power to issue writs of habeas corpus ad prosequendum extraterritorially, recognized that the existence of comity between sovereignities made it unnecessary to invoke the Supremacy Clause, stating:
>
> > 'In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation.' 364 U.S. at 621 n.20.
>
> However, I have no doubt that if a state institution refused to obey a federal writ of habeas corpus ad prosequendum properly issued pursuant to §2241 and thus provoked a federal-state confrontation, the writ would be held enforcible against the institution under the Supremacy Clause." (Slip op. 280).

In footnote 1 to his opinion Judge Mansfield recognized the numerous decisions, beginning with Ponzi v. Fessenden, 258 U.S. 254 (1921), which in dicta have opined that compliance with the federal writ is a matter of comity and nonobligatory. (Slip op. 280).

The Ponzi case, in which Chief Justice Taft wrote that the federal system "of two sovereignties, requires "a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure", however, concerned the authority of the United States Attorney General to authorize the transfer of a federal prisoner to state custody. See 18 USC §4085. Notably, the Ponzi case did not concern enforcibility of federal process. Nor do the cases cited by Judge Mansfield in footnote 1 concern, as he noted, "the question of whether the Supremacy Clause obligates a state to comply with a federal writ." (Slip op. 281).

Similarly, United States v. Oliver, supra, relied on in the majority opinion, for its statement that "[w]hile a writ of habeas corpus ad prosequendum may use mandatory language, the jurisdiction to which such a writ is address is relied upon to cooperate in turning over the defendant to the other sovereign" (Slip op. 271) did not concern the issue of whether the federal writ was enforcible. More important, the cases cited in the Oliver case as support for this proposition do not, themselves, present this issue.[2/]

2/ Cited in the Oliver opinion are: Carbo v. United States, supra, (power of United States Attorney General to deliver federal prisoner to State authorities); McDonald v. Ciccone, 409 F2d 28 (8th Cir. 1969) (State prisoner on writ to federal court has no standing to attack his return to state jurisdiction); United States ex rel. Moses v. Kipp, 232 F2d 147 (7th Cir. 1956) (State prisoner on writ to federal court has no standing to attack his return to state jurisdiction); Lundsford v. Mud[illegible] 126 F.2d 653 (10th Cir. 1942) (state prisoner on writ to federal court properly returned to state jurisdiction and does not commence federal sentence until returned to federal custody after service of state sentence).

But, interestingly, in Oliver, after asserting the allegedly non-mandatory nature of the writ the Court, addressing the problem in the case which concerned the Prompt Disposition Plan [3/] requirement that "reasonable efforts" be made to secure a defendant's presence, stated that the prosecutor "need not bring to bear all possible federal power". 523 F2d at 259. Thus notwithstanding the earlier statement, the Court impliedly recognizes that the full extent of federal power includes the ability to enforce its process and compel the production of a state prisoner before a federal court. We contend that the oft-expressed principle of comity simply means that absent special circumstances the federal writs will forbear from interference with the jurisdiction of the state courts. Cf. Ex Parte Royall, 117 U.S. 241, 250-252 (1885). This is in no way inconsistent with the rule of first acquired jurisdiction that was held in In re Johnson, 167 US 120, 125 (1896) to be "so frequently applied in cases of conflicting jurisdiction between Federal and State Courts". This rule, set forth in the margin, [4/] has been stated to be

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3/ Plan for Achieving Prompt Disposition of Criminal Cases of the Western District of New York.

4/ In In re Johnson, supra at 125, the Court stated:

> "Ever since the case of Ableman v. Booth, 21 How. 506 [62 U.S.], it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession."

"one of comity only, and has a wide application in civil cases, but a limited one in criminal cases" Peckham v. Henkel, 216 US 483, 486 (1909) (emphasis added). Or as one lower court expressed it:

> "It has also become well settled that if a party is on trial or in duress that is, in actual custody-under authority of a state court, no other state court, and no United States Court, should, except in an urgent case, take the defendant from that custody, prior to an actual release or relinquishment of the right to the custody on the part of the court before which the matter is pending." Ex Parte Marrin, 164 Fed. 631, 636 (ED. N.Y. 1908) (emphasis added).

Without unduly prolonging the analysis, it is necessary to examine the early precedents concerning federal supremacy to establish that, notwithstanding, the self-imposed rule of comity, the federal Government may legitimately enforce the writ habeas corpus ad prosequendum if it choses to do so.

Certainly, the federal judicial power extends to criminal prosecutions. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) and this power permits, for example, Congress to authorize the removal of specified state criminal cases to the federal courts. Tennessee v. Davis, 100 U.S. 268 (1879). In this regard, habeas corpus is the means to secure presence of the state prisoner. 28 U.S.C. §1446 (f). By analogy, pursuant to the Supremacy Clause Congress, as provided in §2241(c)(5), has authorized the production of a state prisoner to answer

federal charges. For if Congress can authorize removal of the whole state prosecution into federal court, it surely has the power to authorize the compulsory production of a state prisoner by the ad prosequendum writ. Cf Price v. Johnston, 334 U.S. 266, 283 (1947) (federal prisoner - habeas corpus available to produce prisoner before court to properly dispose of a cause). This compulsion, whether exercised infrequently or not at all, is an indispensable part of federal supremacy.

To hold that the federal Government does not have the power to intrude into the domain of the states so far as may be necessary "to preserve its rightful supremacy" here, the need to vindicate its laws, would be to permit states to impair "if not not ... utterly destroy" its sovereignity. Cf. Tarble's Case, 80 US (13 Wall) 397, 408 (1871). Certainly, the federal courts, as a matter of comity, can make way for the state jurisdiction, since "[if] a person be answerable to two different jurisdictions for offenses against the laws of each, it is a physical fact that he cannot be, at the same time, in the separate control of each." United States v. Marrin, 227 Fed. 319 (ED Pa. 1915). However, the doctrine of comity is one of deference to the generally concurrent sovereignity exercised by each jurisdiction. This concurrence of sovereignity obtains except in one particular: "That particular consists in the supremacy of the authority of the

United States when any conflict arises between the two governments." Tarble's case, supra at 406. It is axiomatic that federal supremacy "necessarily involves the power to command obedience to its laws". In Re Neagle, 135 US 1, 60 (1889). See Ex Parte Siebold, 100 US 371, 395 (1879).

The history of the writ of habeas corpus ad prosequendum is set forth in Carbo v. United States, 364 U.S. supra at pp. 613-619, and need not be reiterated. It is now expressly authorized in §2241(c)(5) and is, conceptually, similar to the ad testificandum writ. Ex Parte Bollman, 8 U.S. (4 cranch) 75, 95-98 (1807), a writ that is clearly enforcible against state prisoners. Ex Parte Dorr, 44 US (3 How.) 103, 105 (1845). Similarly, the writ of habeas corpus ad prosequendum, a necessary adjunct to the federal judicial power, the analogue of the testificandum writ, should be held enforcible against a state prisoner. 5/

In sum, since a writ of habeas corpus is a fully enforcible federal court order, it has, as Judge Mansfield

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5/ Cases such as Stamphill v. United States, 135 F2d 177, 178 (10th Cir. 1943), Strand v. Schmittroth, 251 F2d 590, 605 (9th Cir. 1957) and Application of Nelson, 434 F2d 748, 751 (10th Cir. 1970) asserting by way of dicta that there is no federal supremacy with respect to the obtainment of state prisoners should be disregarded. In Stamphill, the issue was whether the state's surrender of Stamphill pursuant to a writ, was for trial only or included service of his sentence. The issue in Strand was whether a federal probationer would be arrested by state authorities. Finally, Nelson concerned the enforcibility of a federal mandate calling for service of a federal sentence. In this latter case, absent state consent there is no statutory authority to enforce the mandate, although, we would argue that there could be if Congress wished.

stated a "significant function and legal difference" from a detainer (Slip op. 278). The writ is, therefore, simply not a detainer and the Agreement is inapplicable.

C. Congress did not either impliedly repeal §2241(c)(5) or classify the writ of habeas corpus ad prosequendum as a detainer.

Judge Mansfield, dissenting, stated: "Congress, in adopting the Detainers Act, did not intend to classify federal writs of habeas corpus as detainer or to subject such writs to the limitations of the Act." (Slip op. 282). We agree. Nowhere in the legislative history does it appear, that Congress intended to limit the scope and application of the Writ of habeas corpus ad prosequendum. See, Senate Committee on the Judiciary Report on S1. Indeed, the writ is not mentioned or referred to in the legislative history. Thus to hold that the Agreement includes the writ as an administrative detainer, absent any mention of this issue whatsoever in the Agreement or its history, is contrary to the rule that "where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation." Rosencrans v. United States, 165, U.S. 257, 262 (1897).

CONCLUSION

Rule 35 of the Federal Rules of Appellate Procedure provides that petitions for rehearing en banc are not favored and that such rehearing originally will not be ordered except "***(2) when the proceeding involves a question of exceptional importance". We respectfully submit that this standard has been met here.

The scope of the supremacy clause, as pertains to the enforcibility of a valid federal court order issued pursuant to an extant statute presents an issue of exceptional importance. Also, of great significance, the holding presents an issue of crucial importance to the orderly administration of the federal system of criminal justice where federal prosecutors and district courts have relied upon §2241(c)(5) and in consequence thereof there now are, and will be, unwarranted dismissals of otherwise valid federal indictments. 6/

6/ Already, as expected, numerous "Mauro-type" motions have been filed. E.G., United States v. Holmes, 75 CR 961 (E.D.N.Y.) (hijack case-decision pending); Collins v. United States, 76 C 1249 (E.D.N.Y.) (§2255 proceeding-gun case-decision pending); Flammia v. United States, 76 C 1244 (E.D.N.Y.) (same); Peters v. United States, 76 C 1270 (E.D.N.Y.) (same); United States v. Ford, (Court of Appeals, Docket No. 76-1319 (Appeal pending)); United States v. Cyphers & Ferro, Court of Appeals, Docket Nos. 76-1131, 76-1160 (appeal pending); See also, United States v. Kenan, F.Supp. (D.C. Mass., Crim. No. 76-157-C, decided October 28, 1976).

Accordingly, we respectfully submit that this petition for rehearing or, in the alternative for rehearing en banc should be granted, and the orders of the district court should be reversed.

Dated: Brooklyn, New York
December 9, 1976

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